HOCK HUAT CHAN SDN BHD A

v.

ASSAN MOHAMMAD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING B
DAVID WONG DAK WAH J
[SUIT NO: 22-21-2003-III(I)]
10 MARCH 2008

CUSTOMS AND EXCISE: *Seizure - Imported rice - False declaration - Whether seizure lawful - Applicable test - 'Reasonable cause to suspect' - Visual examination of goods by customs officers prior to seizure - Whether indicating reasonable cause - Notice of seizure - Customs Act 1967, ss. 114, 128, 132, 133, 135* C

CUSTOMS AND EXCISE: *Forfeiture - Notice - Imported rice - False declaration - Forfeiture procedure - Whether subject to rules of natural justice - Whether to be seen in context of constitutional right to property - Director of Customs - Whether duty bound to notify owner of forfeiture if no claim made within one month of seizure if no prosecution laid out - Chemist report on seized goods - Whether should be obtained before lapse of one-month period - Customs Act 1967, ss. 114, 128, 132, 133, 135 - Federal Constitution, art. 13* D E

The defendants customs authority had seized five containers of imported rice belonging to the plaintiff upon the allegation that the goods were not 'temukut' (broken rice for animal consumption) as declared by the plaintiff. Having seized the goods, the defendants issued a notice of seizure under s. 114 of the Customs Act 1967 ('the Act') in respect of one container, but not as against the rest. The non-service of notice notwithstanding, the defendants went on to seize all the five batches of rice. Further, there being no claim of ownership made by the plaintiff within one month thereof (s. 128), the goods were forfeited by the defendants. The plaintiff alleged that the seizure was without 'reasonable or probable cause', and in the circumstances applied for a declaration that the seizure was unlawful and null and void, general damages to be assessed and special damages of RM681,795. The defendants argued that the test applicable is not one of "reasonable or probable cause" (s. 132) but rather "reasonable cause to suspect" (s. 114(1)) – and in any case submitted that the test in s. 114(1) F G H I

had been met with since the customs officers had visually examined the containers before concluding that they were not temukut. The defendants further argued that in respect of the four remaining batches of rice, no notice of seizure was required as the seizure was made in the presence of the plaintiff's agents. The learned judge, while dwelling on the effect and applicability of ss. 114, 128 and 132 of the Act *inter alia*, framed two specific questions for the court to answer, namely: (i) whether, in view of art. 13 of the Federal Constitution ('FC'), there was a duty on the defendants to issue a 'notice of forfeiture' to the plaintiff explaining the consequence of not claiming ownership of the seized goods within a month of seizure if there is no prosecution laid; and (ii) if so, what form of notice is required for the purpose.

Held (ruling goods properly seized but improperly forfeited; ordering magistrate to adjudicate on claim of ownership):

(1) There is no difference in the two tests highlighted. Both s. 114(1) and s. 132 of the Act are provisions concerning seizure. The former states that as long as the relevant officers had "reasonable cause to suspect", any seizure made on that premise is deemed legal. If that seizure is legal it must be legal for the whole Act. Hence, to construe a different test for the phrase "reasonable or probable cause" appearing in s. 132 of the Act does not make sense. (para 8)

(2) The evidence of DW1, DW7 and DW8 herein were straightforward. They all made visual examination of the relevant containers and came to the conclusion that the contents were rice as opposed to 'temukut'. The belief of these witnesses is corroborated by the chemist who states that the goods seized would very well be rice rather than 'temukut'. In short, the belief or conclusion made by these three customs officers was not made without reasonable or probable cause to suspect. Accordingly, the seizure was legally carried out. (paras 10 & 11)

(3) In view of the question (i) posed, the court must look at what the word "law" in art. 13(1) of the FC means. There is no doubt that the word "law" refers to a system of law which consists of fundamental principles of natural justice of the common law. The two basic rules of natural justice are firstly

no one is to be condemned unheard, and secondly the rule against bias. In this case, the court is concerned with the first basic rule. (paras 18, 21 & 22)

(4) The Act provides that when goods are seized and there is no prosecution, the owner of the goods must make a written claim for the ownership within one calendar month from the date of seizure. And if a written claim is made, it must be referred to a magistrate who will conduct a hearing to decide whether the seized goods are the subject matter of any customs offence. Needless to say, when seized goods are forfeited the owner's rights or interests are affected. He is therefore entitled to be heard before forfeiture could set in. Consequently, notwithstanding that the law is silent as to whether a notice of forfeiture is required, natural justice demands that a written notice should be given to the plaintiff informing it of the consequences of not making a written claim. (paras 23, 24, 25 & 26)

(5) Paragraph 4 of the notice of seizure specifically requires the defendants to attach a copy of s. 128 of the Act with the notice of seizure. It is conceded here that such copy was not attached to the notice of seizure in respect of the first batch. The purpose of para 4 is to inform the owners of the seized goods the consequence of not claiming ownership of them if there is no prosecution. Clearly, the drafters had included para 4 because it was a fair and reasonable thing to do bearing in mind that it involved deprivation of someone's property where no offence has been proved or prosecution laid. Further, the plaintiff has a "legitimate expectation" to be informed of the right to make a claim for the seized goods. (para 27)

(6) The conduct of the defendants in only sending the seized goods to the chemist for analysis way after the one calendar month period is perplexing, as by the time the analysis result was returned the seized goods had been notionally forfeited. Surely the plaintiff and the people in its position ought to be able to know the result of the analysis of the seized goods before the expiration of the calendar month provided in s. 128 of the Act. Only with such knowledge can the plaintiff be able to make an informed decision on whether or not to claim for the ownership of the seized goods. In the circumstances, the

plaintiff's quest for the court to read into s. 128 that the defendant must determine the status of the seized goods within one calendar month is not without merit. (para 28)

(7) Adopting the approach in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors*, it must be read into s. 114 of the Act a requirement that the second defendant Director of Customs is duty bound to attach to the notice of seizure a written notice of forfeiture explaining to and warning the owners of the goods seized in plain language that if there is no prosecution in respect of the goods seized, the goods will be forfeited if there is no written claim for ownership given to the second defendant within one calendar month from the date of seizure. This written notice of forfeiture should be in the following form, namely:

"Notice of Forfeiture

Please be informed that under the law the goods seized in the notice of seizure in which there is no prosecution will be forfeited if you do not make a claim for ownership to Royal Customs Department within one calendar month from the date of seizure. You are also advised to seek legal advice on this notice of forfeiture". (para 30)

[Ownership of seized goods to be adjudicated by magistrate pursuant to s. 128(4) of the Act.]

Case(s) referred to:

Hicks v. Faulkner [1881] 8 QBD 167 ***(refd)***

Ong Ah Chuan v. PP and Koh Chai Cheng v. PP [1980] 1 LNS 181 ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Ketua Polis Negara & Anor v. Gan Bee Huat and Other Appeals [1998] 3 CLJ 1 SC ***(refd)***

Lloyd v. McMahon [1987] AC 625 ***(refd)***

Pierson v. Secretary of State for the Home Department [1997] 3 All ER 57 ***(refd)***

Prince Pinder v. The Queen [2002] UKPC 46 ***(refd)***

S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***

Legislation referred to:

Customs Act 1967, ss. 114(1), (3), 128(1), (4), 132, 133, 135

Federal Constitution, art. 13(1)

Other source(s) referred to:
Administrative Law of Malaysia and Singapore, 3rd edn, p 226

For the plaintiff - Baru Bian; M/s Baru Bian Advocates
For the defendant - Dato' Abdul Rahman Sebli SFC (Saful Edris SFC with him)

Reported by Wan Sharif Wan Ahmad

JUDGMENT

David Wong Dak Wah J:

Proceedings

[1] The plaintiff's claims are as follows:

i. A declaration that the seizures of all the said goods by the servant and/or agents of the defendants were illegal, unlawful and/or null and void:

ii. A declaration that the sale of all the said goods to Bernas were illegal, unlawful and/or null and void;

iii. Special damages totaling RM681,795

iv. General damages to be assessed by this court;

v. Exemplary damages;

vi. Interest to be charged on the said amount of damages at the rate of 8% per annum from the date of seizure to date of judgment and realization;

vii. Any other orders or reliefs this Honourable Court deems fit and just; and

viii. Costs of this action.

[2] The above reliefs are based on the allegation that the defendants' seizures of the plaintiff's goods were done "without reasonable or legal ground or reasonable or probable cause".

[3] For the defendants, their defense was that the seizures were carried out properly pursuant to the Customs Act 1967 and since the plaintiff had not made its claim within one month from the dates of seizures as provided for in s. 128(1) of the Customs Act 1967 the goods were deemed to be forfeited.

The Facts

[4] The plaintiff is a licensed importer and wholesaler of rice including a license to import rice and broken rice also known as Temukut. Five batches of different containers containing Temukut were seized by the Royal Malaysian Customs Sarawak on 20 November 2001, 27 March 2002, 2 April 2002 and 15 May 2002 for false declaration and smuggling rice into Sarawak, contravening ss. 133 and 135 of the Customs Act 1967.

Issues

Were The Goods Legally Seized?

[5] Mr Baru Bian, counsel for the plaintiff, submitted that for any seizure to be legal, it must be done based on reasonable or probable cause and referred the court to what was stated by Hawkins J in *Hicks v. Faulkner* [1881] 8 QBD 167 which is as follows:

> I should define reasonable and probable cause to be, *an honest belief in the guilt of the accused based upon a full conviction,* founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, *would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.* (emphasis added).

[6] Mr Baru Bian referred to four grounds in which to base his contention that the seizure was done without any reasonable or probable cause:

1. The fact that there is no prosecution against the plaintiff for any offence under the Customs Act is itself evidence that the seizure was made without reasonable or probable cause.

2. The fact that the plaintiff had imported the same type of goods seized on many occasions without any seizures by the Customs Department is proof that there was malice in the seizure.

3. Samples taken from the seized goods were not sent to the chemist for analysis immediately which makes a mockery of s. 128(1) of the Customs Act. This is how Mr. Bian puts it:

> My Lord, after reading the said section 128, it is my respectful submission that the servant or agent of the 2nd or 3rd defendant must determine the status of the goods seized within 30 days of its seizure otherwise the provisions of section 128 would be rendered impracticable or useless. This is so because once a claim is made by the owner and after 30 days period had expired, the goods or the proceeds from its sale must either be returned to the owner or the matter is referred to the Court. Evidenced from the documents before the court and the testimonies of the two chemists, DW3, CHOO HEI MEE and DW4, RAMI AK GENDANG, all the samples purportedly taken from the Plaintiff's seized containers were only received by DW3, on the *21st March 2002,* (3 Exhibits of plastic bag), and returned to the Defendants on the *17th May 2002,* and the rest of the samples by DW4 on the *13th June 2002* (5 Exhibits of plastic bag) and returned to the Defendants only on *29th August 2002. [See Exhibit "B" at pp.37-41].* Pausing here for a moment, it is my respectful submission that there is no evidence adduced by the Defendants to link which samples or exhibits sent to the chemists DW3 and DW4 were taken from certain container or containers seized. Here lies a break in the chain of evidence of the Defendants' case. Nevertheless even assuming that the samples that were received by DW3 were those taken from the First Batch of Goods seized on 30th November 2001, it is noted that it was handed to the chemist DW3 *3 months 21 days after its seizure* and the Defendant knew of its result *5 months 17 days* after its seizure. As to the rest of the samples or exhibits, assuming they were taken from the rest of the four Batches of Goods, the last which was seized in December 2001, it is absolutely unacceptable that the samples were only sent to DW4 on 13th June 2002, *5 months 13 days after their seizures* and the result known to the Defendants only on *29th August 2002, 8 months after their seizures.* (emphasis added)

4. The refusal of the defendants to sell the seized goods back to the plaintiff is another factor which point to the conclusion that the defendants had malicious intent in seizing the goods.

[7] Dato' Abdul Rahman bin Sebli, Senior Federal Counsel (SFC) for the defendants however submitted that the test is not "reasonable or probable cause" but "reasonable cause to suspect" as prescribed in s. 114(1) of the Customs Act which deals with the powers of seizure. The phrase "reasonable or probable cause"

is found in s. 132 of the Customs Act which allows certain claims for the return of the seized goods or payment of their value only when the seizure had been made 'without reasonable or probable cause'.

[8] In my view, there is no difference in the two tests and my reason for saying so is this. Both s. 114(1) and s. 132 of the Customs Act are provisions concerning seizure. The former states that as long as the relevant officers had 'reasonable cause to suspect', any seizure made on that premise is deemed to be legal. If that seizure is legal it is legal for the whole Act. To construe a different test for the phrase "reasonable or probable cause" appearing in s. 132 of the Customs Act does not make sense and contrary to sensible interpretation of provisions in statute.

[9] What is "reasonable cause to suspect" can of course only be gathered from the circumstances of each individual case. The burden of proof lies on the plaintiff to prove it on a balance of probability.

[10] The pertinent time in determining this issue must be the time when the seizures were made by DW1, DW7 and DW8 (all agents of the defendants). Their evidences in my view were pretty straightforward. They all made visual examination of the relevant containers and came to the conclusion that the contents were rice as opposed to 'temukut' (broken rice for animal consumption) which contravene the AP's condition which permits only the importation of 'temukut'. This belief by DW1, DW7 and DW8 of possible offences under the Customs Act was related to the plaintiff's agents. This belief is further corroborated by the evidences of the chemists called, which states that the goods seized could very well be rice rather than 'temukut'. In short the belief or conclusion made by the three customs officers was not made without reasonable or probable cause to suspect.

[11] Accordingly I find that the seizure was legally carried out.

Were The Goods Properly Forfeited?

[12] The relevant facts for this issue are these. Five batches of different containers belonging to the plaintiff were seized by the Royal Malaysian Customs Department, Sarawak. Written notice of the seizure was only given in respect of the 1st batch seized while for the remaining four batches no such notice was given.

[13] The learned SFC, on this issue, submitted that the defendants had fully complied with the requirements set out in s. 114(3) of the Customs Act. In respect of the 1st batch, a written notice dated 30 November 2001 was given to the plaintiff. As for the remaining 4 batches, no notice of seizure was required as the seizure was made in the presence of the plaintiff's agents as provided in s. 114(3) of the Customs Act. And since no written claim of ownership by the plaintiff for the seized goods was given to the defendants within one month from the date of seizures, the plaintiff's goods are deemed to be forfeited. He also relied on the case of *Ketua Polis Negara & Anor v. Gan Bee Huat and Other Appeals* [1998] 3 CLJ 1 where the Supreme Court dealt with the similar provisions in the Dangerous Drugs (Forfeiture of Property) Act 1988 and held no such notice of seizure was required when the goods were seized in the presence of the owner or agent.

[14] On 16 January 2008, I recalled counsels back to address me on two issues:

1. Whether there is a duty on the part of the defendants to issue a Notice of Forfeiture to the plaintiff explaining the consequence of not claiming the ownership of the seized goods within a month of seizure if there is no prosecution in view of art. 13 of the Federal Constitution?

2. If the answer to the 1st question is in the affirmative, what form of notice is required?

[15] Article 13 of the Federal Constitution provides as follows:

> **3. Rights to property.**
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall **provide** for the compulsory acquisition or use of property without adequate compensation.

[16] In finding an answer to the issue (1) posed by me, I must now look at what the word "law" in art. 13(1) of Federal Constitution means.

[17] The learned SFC approached the issue in this manner. He submitted that the "law" is as provided for in s. 114(3) and s. 128 of the Customs Act (attached in appendix A) which only require an issuance of a written notice of seizure containing the

grounds of seizure when the owner is known. If the owner is not known or where the seizure is done in the presence of the offender or the owner or his agent such notice is not required. And if no claim is made by the owner within one calendar month from the date of seizure, the seized goods will be notionally forfeited. And since there is no specific provision for an issuance of a notice of forfeiture; he urged the court not to imply a duty to issue a notice of forfeiture in s. 114(3) of the Customs Act.

[18] Judicial pronouncement on what the word "law" means can be found in the case of *Ong Ah Chuan v. PP* and *Koh Chai Cheng v. PP* [1980] 1 LNS 181 where the Privy Council said:

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery.

[19] The *dictum* of the Privy Council was quoted with approval by the Federal Court in the case of *S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314. In its judgment their Lordships said:

> We regret we are unable to agree with the learned Judge on his construction of the provisions of clauses. (1) and (2) of Article 13 of the Constitution when he held that they are in effect mutually exclusive. The Privy Council decided in *Government of Malaysia & Anor. v. Selangor Pilot Association* [1977] 1 MLJ 133, 135; [1978] AC 337, 347 that Article 13 cannot properly be construed in the way in which Article 31 of the Constitution of India has been construed as deprivation may take many forms

which would naturally include acquisition or use but that those are not the only ways by which deprivation can be effected. We therefore have to consider the connotation of the term 'law' in Article 13(1) which stipulates that no person shall be deprived of property save in accordance with law. Lord Diplock in delivering the judgment of the Privy Council in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, 71; [1981] AC 648 said (at p. 670) that 'law' in such a context refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution, referring to that of Singapore but this equally applies to similar written constitutions including ours. We should perhaps add that *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, 71; [1981] AC 648 dealt with the question of presumptions and burden of proof.

The Legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees. In an appeal from New Zealand the Privy Council approved of the idea that natural justice could be effectively excluded by a legislative code in *Furnell v. Whangarei High Schools Board* [1973] AC 660, 679 which concerned the disciplinary code for New Zealand government teachers. Charges against a school teacher were investigated by a subcommittee which reported to the high school's board. Neither the sub-committee nor the board gave the school teacher an opportunity of making representations but he was suspended from teaching pending consideration and decision by the teachers' disciplinary board. The majority opinion held that the legislative code was not unfair and refused a writ of prohibition, stating (at p. 679) that it is not 'the function of the Court to re-draft the code' and referring with approval to the decision of the High Court of Australia in *Brettingham-Moore v. Municipality of St. Leonards* [1969] 121 CLR 509, 524 which held in effect (at p. 524) that it is not for the Court to amend the statute by engrafting upon it some other provision which it might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material. As we have said earlier there is express provision in the Act for an inquiry and hearing in respect of the quantum of compensation payable but none with regard to the acquisition itself of land needed for the purposes specified in s. 3. This attracts the application of the maxim *'expressio unius est exclusio alterius'* which has been used to exclude natural justice (*Hulton v. Attorney-General* [1927] 1 Ch. 427.

[20] The common law of England referred to in the judgment of *Ong Ah Chuan v. PP (supra)* is what was said by Lord Steyn in *Pierson v. Secretary of State for the Home Department* [1997] 3 All ER 57 at p. 606:

> But counsel addressed the wrong target. The correct analysis of this case is in terms of the rule of law. The rule of law in its wider sense has procedural and substantive effect. While Dicey's description of the rule of law (Introduction to the Study of the Law of the Constitution, 10th edn, 1968, p203) is nowadays regarded as neither exhaustive nor entirely accurate even for his own time, there is much of enduring value in the work of this great lawyer. Dicey's famous third meaning of the rule of law is apposite. He said:
>
> > The "rule of law", lastly, may be used as a formula for expressing the fact that with us the law of constitution, the rules which in foreign countries normally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts, that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land.
>
> This was the pivot Dicey's discussion of rights to personal freedom, and to freedom of association and of public meeting (see 206-283). It is clear therefore that in the relevant sense Dicey regarded the rule of law as having both procedural and substantive effect. In a valuable essay, Professor Jowell has re-examined Dicey's theme: see *The Rule of Law Today in The Changing Constitution* by Jowell and Oliver, 3rd Edition 1994, pp 74-77. … Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural. I therefore approach the problem in the present case on this basis.

[21] From the above authorities, there is no doubt in my mind that the word "law" refers to a system of law which consists of fundamental principles of natural justice of the common law. The two basic rules of natural justice are: (1) no one is to be condemned unheard; (2) the rule against bias.

[22] In this case we are concerned with the first basic rule. What elements are contained in the rule depends on the facts of each individual case. This much is clear from what Lord Bridge of Harwich said in *Lloyd v. McMahon* [1987] AC 625, 702-703:

> My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates …

[23] To recap, the Customs Act provides that when goods are seized and there is no prosecution, the owner of the goods must make a written claim for the ownership within one calendar month from the date of seizure. Failure to do so will result in the seized goods being forfeited. If a written claim is made, it is referred to a magistrate who will conduct a hearing to decide whether the seized goods are the subject matter of any customs offence.

[24] In my view needless to say, when seized goods are being forfeited the owner's rights or interests are affected, and he or she is therefore is entitled to be heard before forfeiture sets in. The learned SFC on this point however submitted that the right to be heard had not been taken away. In fact that right will be given to the plaintiff had it made a written claim to the 2nd defendant as provided for in s. 128 of the Customs Act.

[25] With respect, I disagree with such interpretation and my reasons are these. One basic component of natural justice is that the party concerned must be given clear notice that his or her rights are to be affected so that he or she can adequately defend himself or herself. No doubt that the law on notional forfeiture is set out in s. 128 of the Customs Act. But is that enough or fair? In my view, it is only fair if one can presume that the ordinary citizens of the country know the law of the land. Common sense dictates that such a presumption cannot be made. That being the case, then I ask myself the question and that is "whether, in the circumstance of the present case, it is fair that a written notice of forfeiture (explaining the consequence of not making a written claim for the seized goods within one calendar month if there is no prosecution) be given to the owners of the seized goods?"

[26] Having evaluated the relevant circumstances in the present case, I have no hesitation in saying that natural justice demands that a written notice should be given to the plaintiff informing it of the consequence of not making a written claim. My view is in fact supported by the format of the notice of seizure used by the defendants. For clarity I reproduce the defendants' notice of seizure – p. 57 of exh. B together with a translated English version:

Lampiran 11-B
PTP.11-03(a)

JABATAN KASTAM DAN EKSAIS DIRAJA
Cawangan Pencegahan
Kuching. Tel: 333133 Ext 254/255
Tarikh: 30.11.2001 @ 1615 hrs. **D3**

NOTIS RAMPASAN

Dalam menjalankan kuasa-kuasa yang diberi oleh ~~Seksyen 40(2) Akta Cukai Jualan 1972/~~ Seksyen 114 Akta Kastam 1967/~~Seksyen 30(2) Akta Dadah Berbahaya 1952/Seksyen 54(3) Akta Eksais 1976/ Seksyen 14(3) Undang-Undang Membaharui (Penghapusan Samsu Gelap) 1976,~~ saya (nama

Suhaili bin Haji Bangkol sebagai pegawai yang membuat rampasan dengan ini memberitahu anda, Tuan CHUA HONG KIM @ CHUA YANG LEE No. K/P 490714-13-5455 dari (alamat) Hock Huat Chan Sdn. Berhad, Batu 3, Jln. Simpang, Simpang, Perak telah pada (tarikh) 30.11.2001 di (tempat) Ibu-Pejabat Kastam, Bahagian Pencegahan, Kuching merampas perkara yang berikut:-

1) 3 x 20' Kontena Bernombor :	E0LU 8831625
	TTNU 2995900
	PCIU 3463400
	Mengandungi 1500 Bags Beras
2) 1 set of Dokument	(B/L No: TS/SIN/KCH14)
	(Invoice No. 1366/01)

2. Barang-barang yang tersebut diatas/kenderaan/vessel/kapal udara telah dirampas kerana mempunyai sebab yang munasabah untuk disyaki bahawa kesalahan telah dilakukan di bawah Seksyen 135(1) (a) dan 133(1) (a) Akta yang tersebut.

3. Bersesuaian dengan Seksyen 126 Akta tersebut, semua barang yang boleh dirampas di bawah peruntukan Akta tersebut boleh dilucut hak.

4. Bagi barang-barang yang tersebut di atas yang telah dirampas di mana tidak ada dakwaan, Seksyen 128/Seksyen 30(7), (8), (9), (10)/Seksyen __ bagi Akta yang tersebut disalinkan sebagai makluman dan tindakan anda selanjutnya, jika ada:-

(Sebutkan seksyen berkaitan)

Kepada: Chua Hong Kim
c/o Hock Huat Chan
Sdn. Berhad,
Batu 3, Jalan Simpang,
34700 Simpang, Taiping,
Perak.
Tel: 019-8563318
082-243326

Sgd
(Nama) Suhaili B. Hj. Bangkol
(Pangkat) PiKK(P)

JABATAN KASTAM DAN EKSAIS DIRAJA
Prevention Branch
Kuching Tel : 333133 Ext 254/255
Date: 30.11.2001

NOTICE OF SEIZURE

In the course of exercising the powers given under ~~Section 40(2) Sales Duty Act 1972/~~ Section 114 Customs Act 1967/ ~~Section 30(2) Dangerous Drugs Act 1952/ Section 54(3) Excise Act 1976/ Section 14(3) Undang-undang Membaharui (Penghapusan Samsu Gelap) 1976,~~ I Suhaili bin Haji Bangkol as the officer who conducted this seizure hereby inform you that, Mr Chua Hong Kim @ Chua Yang Lee I/C No. 490714-13-5455 from (address) Hock Huat Sdn Bhd, Batu 3, Jln Simpang, Simpang, Perak had on 30.11.2001 at Customs Headquarters, Prevention Division, Kuching seized the following:

1) 3 x 20' container no. EOLU 8831625
TTNU 2995900
PCIU 3463400
Containing 1500 bags of rice

2) 1 set of document (B/L No. TS/SIN/KCH14, Invoice No. 1366/01)

2. Goods mentioned above/vehicle/vessel/aircraft have been seized due to the reasonable cause that a wrong has been committed under Section 135(1)(a) and 133(1)(a) of the Act.

3. In line with Section 126 of the Act, all goods that can be seized under the provisions of the Act can be forfeited.

4. Where the goods have been seized but there has been no prosecution, Section 128/Section 30(7), (8), (9), (10)/Section ____ of the Act is hereby enclosed for your information and further action, if any:

(State the relevant sections)

To: Chua Hong Kim
c/o Hock Huat Chan
Sdn Berhad,
Batu 3, Jalan Simpang,
34700 Simpang, Taiping,
Perak.
Tel: 019-8563318
082-243326

...
(Name) Suhaili b. Hj. Bangkol
(Position) PiKK(P)

[27] One will note that para 4 of the notice of seizure specifically requires the defendants' employees to attach a copy of s. 128 of the Customs Act with the notice of seizure. It is conceded by the learned SFC that a copy of s. 128 of the Customs Act was not attached to the notice of seizure in respect of the first batch. There is no doubt in my mind that the purpose of para 4 is to inform the owners of the seized goods the consequence of not claiming ownership of them if there is no prosecution. And I also have no doubt that when this notice of seizure was drafted, the drafter included para 4 because it was fair and reasonable thing to do so bearing in mind that it involved deprivation of someone's property where no offence has been proved or prosecution laid. The learned SFC however submitted that the law did not require such forfeiture notice and urged the court to ignore para 4. With respect the law is silent as to whether a notice of forfeiture is required. Nor were there any clear words in the legislation which exclude the principle of natural justice. Further if one is to concede to the learned SFC's contention it would appear that a person who is charged under the Customs Act would be in a better position than a person who is not charged as the person charged will have an opportunity to claim ownership of the seized goods. That with respect cannot be correct. Further it would not be wrong to say that the plaintiff has a "legitimate expectation" to be informed of the right to make a claim for the seized goods.

[28] I also find the conduct of the defendants' servants or agents in only sending the seized goods to the chemist for analysis way after the one calendar month period perplexing as by the time the analysis result was returned by the Chemist the seized goods had been notionally forfeited. Surely the plaintiff and people in its position ought to be able to know the result of the analysis of the seized goods before the expiration of the calendar month provided for in s. 128 of the Customs Act. Only with the knowledge of that analysis can the plaintiff be able to make an informed decision on whether or not to claim for the ownership of the seized goods. Mr. Baru Bian in his submission had asked the court to read into s. 128 of the Customs Act that the defendants must determine the status of the seized goods within one calendar month. The argument is not without merit. However I will pass on making a ruling on that point. However the conduct of the defendants' servants or agents in this case constitutes a strong consideration which I take into account in coming to my conclusion.

[29] Does that then mean that s. 128 of the Customs Act is invalid and ought to be struck down? In dealing with this issue I adopt the approach used by Gopal Sri Ram JCA in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 191. In that case, the Court of Appeal had to deal with a State legislation which was inconsistent with the Federal Constitution and this is how the court approached the inconsistency.

> As regards s. 12, it is a pre-Merdeka provision. It must therefore be interpreted in a modified way so that it fits in with the Federal Constitution. In *Kanda v. Government of Malaya* [1962] MLJ 169, Lord Denning when delivering the advice of the Board said:
>
> > In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.
>
> … The way in which s. 12 is to be brought into conformity with the Constitution is to make it yield to art. 13(2) which reads:
>
> > 13(2) No law shall provide for compulsory acquisition or use of property without adequate compensation.
>
> That is achieved by not reading the words "the State Authority may grant compensation therefor" as conferring a discretion on the State Authority whether to grant compensation or not. For otherwise it would render s. 12 of the 1954 Act violative of art.

A 13(2) and void because it will be a law that provides for the compulsory acquisition of property without adequate compensation. A statute which confers a discretion on an acquiring authority whether to pay compensation or not enables that authority not to pay any compensation. It is therefore a law that does not provide for the payment of adequate compensation and that is why s. 12 will be unconstitutional. Such a consequence is to be avoided, if possible, because a court in its constitutional role always tries to uphold a statute rather than strike it down as violating the Constitution. As Jeevan Reddy J said in *State of Bihar and Others v. Bihar Distillery Ltd.* AIR [1997] SC 1511:

> The approach of the Court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should to try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it.

… This is indeed the approach I have adopted in para. 37 of this judgment.

[30] So adopting that approach, I hold that there must be read into s. 114 of Customs Act a requirement on the part of the 2nd defendant or his servants or agents to attach with the notice of seizure a written notice of forfeiture explaining or warning in plain language to the owners of the goods seized that if there is no prosecution in respect of the goods seized, they will be forfeited if there is no written claim for ownership given to the Director of Customs, Sarawak within one calendar month from the date of the seizure. This written notice of forfeiture must be given irrespective whether or not a notice of seizure is required to be given. The form of the notice of forfeiture must be in a form similar to the one set out here:

Notice of Forfeiture:

Please be informed that under the law the goods seized in the notice of seizure in which there is no prosecution will be forfeited if you do not make a claim for ownership to Royal Customs Department within one calendar month from the date of seizure. You are also advised to seek legal advice on this notice of forfeiture.

[31] Even without taking into consideration art. 13(1) of the Federal Constitution in my deliberation, the issue at hand can be approached by applying the established principles in interpreting statutes. In *Cross on Statutory Interpretation* – 3rd edn, the authors stated as follows:

> Statutes … are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well recognized rules … Longstanding principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament … One function of the word 'presumption' in the context of statutory interpretation is to state the result of this legislative reliance (read or assumed) on firmly established legal principles … These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction and they may be described as "presumptions of general application". At the level of interpretation, their function is the promotion of brevity on the part of the drafter. Statutes make dreary enough reading as it is and it would be ridiculous to insist in each instance upon an enumeration of the general principles taken for granted.
>
> These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text.

[32] Some of these presumptions are:

1. Parliament will not deny procedural fairness to persons affected by the exercise of public power,
2. Parliament will not interfere with vested property rights,
3. Parliament is fair.

[33] Applying those principles, I am also in no doubt that I should read into s. 114 of the Customs Act a similar duty to issue a notice of forfeiture on terms as set out earlier. This duty is part and parcel of the concept of procedural fairness. Ordinary citizens of the country must be informed of their rights when it involved an exercise of public power resulting in deprivation of property. As stated earlier, it is unreasonable to assume ordinary citizens of the

country know the law. One may argue, as the SFC had done, that ignorance of the law is no excuse. With respect, that argument only applies when an offence is committed. Here we are dealing with procedural fairness in the area of administrative law. Professor MP Jain in *Administrative Law of Malaysia and Singapore* (3rd edn) at p. 226 had this to say on procedural fairness in the context of administrative laws:

> Procedural fairness is an integral part of Administrative law. As has been emphasized by a Judge of the US Supreme Court: 'Procedural fairness and regularity are of indispensible essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. The edifice of natural justice is built upon the well known adage that no one should be condemned unheard. It is to be regarded as a fundamental principle of civilized jurisprudence that a person against whom action is proposed to be taken adversely affecting his rights or interest, ought to be given an opportunity to be heard.

[34] And the only way to ensure that he or she is heard is to inform him or her of his or her rights, otherwise the rights given in the law are in fact meaningless rights.

[35] Let me say that I am fully aware of the argument that the issues posed by me should not be considered as they had not been pleaded by the plaintiff. As a retort, I can do no better than to refer what Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Prince Pinder v. The Queen* [2002] UKPC 46 said:

> (It) should never be forgotten that courts are the guardian of constitutional rights. A vitally important function of courts is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given "strict and narrow, rather than broad, construction: see *State v. Petrus* per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in *R v. Hughes.*

[36] For all the reasons given above, I find that the seized goods were not properly forfeited and pursuant to prayer (vii) of the statement of claim, I order the plaintiff's claim of ownership of the seized goods be adjudicated before the magistrate court as provided for in s. 128(4) of the Customs Act. As to prayers (i) to

(vi) of the statement of claim, they are struck out. As for costs in prayer (viii) of the statement of claim, each party is to bear its own costs and my reason for this is that the plaintiff had not completely won this case plus the fact that the issues posed by me had not been pleaded by plaintiff in its statement of claim.